Supreme Court, U.S.
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In the

Supreme Court of the United States

JIANRONG CHEN,

Petitioner,

v.

CITY OF NEW YORK, BOARD OF EDUCATION
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of the United States in *Broad of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) carved out an exception to the general proposition that a non-tenured teacher has no property or liberty interest unless "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id at 408 U.S. 574. After some thirty years, there has been no precedent to delineate the boundary of this exception to the general proposition.

The questions presented are (1) whether the New York City Board of Education imposed on a non-tenured teacher a stigma by placing him on the Ineligible/Inquiry List during an investigation of an allegation that he used corporal punishment without due process constitutes a situation where a person's good name, reputation, honor, or integrity is at stake; thereby notice and an opportunity to be heard are essential; and (2) whether a New York State post-deprivation Article 78 proceeding is meaningful and timely to provide an opportunity to the alleged wrongdoer to redress wrongful discharge after his means of livelihood is taken away.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The District Court's opinion (per Sifton, Senior Judge) granting respondents' summary judgment motion (Appendix ("Pet. App.") 6a-15a) is not otherwise published. The Court of Appeals' summary order (per Kearse, joined by Sotomayor and Raggi, Circuit Judges) affirming the judgment of the District Court (Pet.App. 1a-5a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its summary order on November 21, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any State deprive any person of life liberty, or property, without due process of law;

42 U.S.C. §1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner holds regular teaching licenses in the State of New York. In March 1999, petitioner worked as a substitute teacher for the New York City Board of Education in P.S. 126, Jacob Riis Community School.

On March 15, 1999, the school at which petitioner was teaching filed a report with the Board of Education's Office of Special Investigations ("OSI"), alleging that he engaged in corporal punishment. On March 25, 1999, with no warning and hearing, petitioner was placed on the New York City Board of Education's Ineligible/Inquiry List by Robert J. Reich, Director of Office of Appeals and Review of the Office of the Chancellor for an incident occurred on March 9, 1999 for which the petitioner was referred to OSI for allegation of corporal punishment. Immediately, petitioner's file number was invalidated by the Board of Education and he was barred from working for any schools under the control of the Board of Education of

the City of New York, which consists of approximately 1,500 schools throughout the City in comparison to only a few over 100 private schools.

Petitioner was removed from the Ineligible/Inquiry List on June 15, 1999 after OSI concluded that he had not engaged in corporal punishment. Petitioner therefore missed the opportunity to apply for full time summer school teaching positions.

Chancellor's Regulation A-420 governs the investigation and reporting of allegations of corporal punishment, which does not specify that it only applies to teachers with a property interest or liberty interest. Regulation A-420 states:

> Whether the investigation is conducted by the Office of Special Investigations Corporal Punishment Unit or the supervisor, the person alleged to have engaged in corporal punishment will be afforded an opportunity to appear with representation and address the allegations upon 48 hours written notice prior to any action being recommended or taken.

The plain language of the Chancellor's Regulation A-420 clearly affords any person, whether or not having property and liberty interest and who has been accused of engaging in corporal punishment, an opportunity to appear with representation to defend himself upon 48 hours written notice prior to any action being recommended or taken. Petitioner was not afforded such an opportunity before he was placed on the New York City Board of Education's Ineligible/Inquiry List, thereby he was immediately barred from working for

any schools under the control of the New York City Board of Education.

The Director of Office of Appeals and Review of the Office of the Chancellor obviously adopts a policy that people like petitioner's status are not entitled to a hearing before actions are taken. Petitioner did not personally know the director who placed him on the Ineligible list. Nor did the director have anything in person against the petitioner. No evidence yet discovered indicates that the director who placed the petitioner on the ineligible list had any racially motivated intention to deprive petitioner's property or liberty interest. The Director of Office of Appeals and Review of the Office of the Chancellor indicated to the petitioner that they were following their normal procedures in handling the petitioner's case. No indication of random acts or negligence on the part of the Board of Education officials manifested in handling the petitioner's case.

THE DISTRICT COURT DECISION

On April 11, 2000, petitioner brought an action pursuant to 42 U.S.C. §1983 against the New York City Board of Education and the City of New York. Petitioner claimed that respondents deprived him of his property or liberty without due process of law. The alleged deprivation occurred when the Board of Education placed petitioner on the New York City Board of Education's Ineligible/Inquiry List during an investigation of an allegation that he used corporal punishment without affording him an opportunity to appear with representation and to address the allegations upon 48 hours written notice prior to any action being recommended or taken. Pet. App. 6a.

Respondents moved for summary judgment arguing that petitioner did not possess a property interest in his position as a non-tenured substitute teacher, that the Board of Education did not deprive him of any such right, and that any such deprivation was not effected without due process because an adequate post-deprivation remedy was available. Pet.App.6a.

Petitioner's opposition was that the Supreme Court of the United States carved out an exception to the general proposition that a non-tenured teacher had no liberty interest. Where a person's good name, reputation, honor, or integrity is at stake because government is doing to him, notice and an opportunity to be heard are essential. See, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed2d 548 (1972). In the instant case, the petitioner had been stigmatized with an investigation for a charge of corporal punishment and had been suspended by the City School District. This charge of engaging in corporal punishment virtually forecloses petitioner's opportunity to teach in any school, private or public and inside or outside of the City. For 'to be deprived not only of present government employment but of future opportunity for it certainly is no small injury ...." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817.

In addition, petitioner argued that Chancellor's Regulation A-420 grants him a property right by stating that a teacher being investigated has a right to appear with representation and address the allegations upon 48 hours' written notice prior to any action being taken.

Petitioner also argued that New York State Article 78 proceeding provides an inadequate post-deprivation remedy to an erroneous termination or

suspension of a person's job, which provides basic livelihood and the means to obtain essential food, clothing, housing, and medical care. The case in control and on point should be *Goldberg v. Kelly*, 397 U.S. 254 (1970) (a pre-termination hearing is essential, because for qualified receipts welfare provides the means to obtain essential food, clothing, housing, and medical care.)

Respondents also argued that petitioner's deprivation was caused by a random and unauthorized act of a state employee, because his property interest was deprived in violation of Chancellor's regulation A-420.

Petitioner's rebuttal was that the Director of Office of Appeals and Review of the Office of the Chancellor represented the "final authority" and his decisions, which contravene the requirements of a written Chancellor's regulation A-420, can constitute established state procedure. See, *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983) (Decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure.)

On January 3, 2002, the district court granted respondents' motion for summary judgment mainly on the grounds that (1) petitioner did not possess a liberty or property interest in his position as a substitute teacher and that (2) petitioner had opportunity for due process of law under Article 78 of the New York Civil Practice Law and Rules. Pet. App. 15a.

THE SECOND CIRCUIT DECESION

On November 21, 2002, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. However, the Second Circuit did not address whether or not the petitioner has a liberty or property interest, but rested its decision on the ground that New York State Article 78 proceedings provided sufficient post-deprivation remedy where the deprivation of liberty or property interest occurred not because of a governmental policy but instead because of the unauthorized act of a state employee. Pet. App. 3a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for the following reasons. First, after some thirty years since the Supreme Court of the United States carved out an exception to the general proposition that a non-tenured teacher has no property or liberty interest unless "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574, 92 S.Ct. 2701, 33 L.Ed2d 548 (1972), there has been no precedent from this Court to delineate the boundary of this exception. The courts below are confused and are waiting for this Court to give them guidelines.

The confusion in this area of the law is clearly manifested in the decisions below. The District Court's decision relied on New York Educational Law, refusing to accept the exception to the general proposition that even the substitute teacher could have property or liberty interest when "a person's good name, reputation,

honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," Id at 408 U.S. 574. The District Court stated that "[i]t is well settled under New York law that a probationary employee has no property rights in his employment and may be terminated for 'almost any reason or no reason at all.'(citations omitted) A substitute teacher also has no property rights under the New York Educational Law." Pet. App. 9a. The Second Circuit's decision, however, ducked the discussion of the issue entirely by assuming that the petitioner had a liberty or property interest in his continued employment as a substitute teacher. Pet. App. 3a.

None of the decisions below touched the heart of the issue that the petitioner's livelihood was at stake and in reality the petitioner could not practically find a teaching position in any school, private or public and inside or outside the City of New York, when the petitioner had been stigmatized with an investigation for a charge of corporal punishment and had been suspended by the City School District.

In essence, both the District Court and the Second Circuit avoided the discussion of the situation where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id at 408 U.S. 574. Therefore, the petitioner urges this Court to review the case at bar thereby providing guidance on the exception as to whether the New York City Board of Education imposed on a non-tenured teacher a stigma by placing him on the Ineligible/Inquiry List during an investigation of an allegation that he used corporal punishment without due process constitutes a situation where a person's good

name, reputation, honor, or integrity is at stake; thereby notice and an opportunity to be heard are essential.

Second, the Second Circuit also held that post-deprivation Article 78 proceedings were sufficient where the deprivation of liberty or property occurred not because of a governmental policy but instead because of the unauthorized act of a state employee. The Second Circuit relied on its precedent *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877 (2d Cir. 1996) Pet. App. 3a.

The Second Circuit's decision conflicts with holdings of this Court. The case in control and on point should be *Goldberg v. Kelly*, 397 U.S. 254 (1970), because there is an essential fact in the case at bar. Petitioner's livelihood, his basic job, and his means to obtain essential food, clothing, housing, and medical care are at stake. Such an essential factor is missing in *Hellenic*. In *Goldberg*, this Court holds that when welfare is discontinued, only a pre-termination evidentiary hearing provides the receipient with procedural due process. A pre-termination hearing produces an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Should the petitioner was afforded with a pre-termination hearing as mandated by the Chancellor's regulation A-420, petitioner would not be erroneously removed from his active employment.

Moreover, Article 78 of the New York Civil Practice Law and Rule only provides a summary proceeding. The determination of an Article 78 action is not usually timely. In determining the timing and nature of the required hearing, courts must balance "the

importance of the private interest and the length or finality of the deprivation; the likelihood of governmental error; and the magnitude of the governmental interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982). Applying the *Logan* factors to the instant case, a post-deprivation Article 78 proceeding would not come close to affording petitioner with the safeguards of a pre-deprivation hearing. When petitioner's right to work in the City School system is denied, his livelihood becomes immediately in danger. Therefore, Article 78 proceeding does not provide the alleged wrongdoer with a meaningful and timely opportunity to defend himself; especially, when his basic livelihood is at stake.

Third, there is a strong sound public policy reason for this Court to review this case. Chancellor's Regulation A-420 is in place to afford anyone, who is under investigation of corporal punishment, an opportunity to refute the charge before being discharged. This regulation affords the employees being charged with the wrongdoing some protections. By removing the employees from their positions immediately forecloses their freedom to take advantage of other similar employment opportunities. In order to obtain employment, the affected employee must not to tell the truth to the prospective employer, if he wants to obtain a job. This Court shall protect the integrity and morality of our society by not forcing people desperately looking for a job with a temptation to lie about his present employment status.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 02-7121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JIANRONG CHEN,
Plaintiff-Appellant,

v.

CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Defendants-Appellees.

November 21, 2002, Decided

COUNSEL:-
For Appellant: KEVIN K. TUNG, Law Office of Kevin K. Tung, Flushing, NY.

For Appellees: MICHAEL CARDOZO, Corporation Counsel of the City of New York (Michael B. Hess, Larry A. Sonnenshein, and Julian L. Kalkstein, on the brief), New York, NY.

JUDGES:
PRESENT: HON. AMALYA L. KEARSE, HON. SONIA SOTOMAYOR, HON. REENA RAGGI, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Sifton, J.), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff Jianrong Chen appeals from a judgment of the United States District Court for the Eastern District of New York (Sifton, J.) granting defendants the City of New York's ("the City") and the Board of Education of the City of New York's ("the Board") motion for summary judgment. Plaintiff, a substitute teacher, sued the Board and the City under *42 U.S.C. § 1983* after his name was placed on an "ineligibility/inquiry list" following accusations that he had used corporal punishment against a student. Defendants' investigation concluded several months later that plaintiff had not used corporal punishment and his suspension was then lifted.

Plaintiff argues that the defendants violated a protected liberty interest because the placement on the list so stigmatized his reputation that it prevented him from obtaining other work as a teacher. *Cf. Board of Regents v. Roth, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)* ("'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" (quoting *Wisconsin v. Constantineau, 400 U.S. 433, 437, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971)).* Plaintiff also argues that the Board's internal regulation providing that "the person alleged to have engaged in corporal punishment will be afforded an opportunity to appear with representation and address the allegations upon 48 hours written notice prior to any action being recommended or taken," itself creates a property right inasmuch as it promises a hearing before any adverse

action can be taken on allegations of corporal punishment.

Assuming that plaintiff had a liberty or property interest in his continued employment as a substitute teacher, however, this Circuit has held that post-deprivation Article 78 proceedings are sufficient where the deprivation of liberty or property occurred not because of a governmental policy but instead because of the unauthorized act of a state employee. *See Hellenic Am. Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 880-81 (2d Cir. 1996)* (citing *Hudson v. Palmer, 468 U.S. 517, 532, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984); Parratt v. Taylor, 451 U.S. 527, 541, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986); Zinermon v. Burch, 494 U.S. 113, 132, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990)).*

Plaintiff has identified no governmental procedure under which his property or liberty interests were deprived-indeed, as in *Hellenic*, his claim to a property interest is based on the existence of a municipal procedure protecting his rights to notice and an opportunity to be heard, which the defendants are alleged to have violated.[1] Although plaintiff contends that Reich had "adopted a policy that people like plaintiff[] are not entitled to a hearing before actions are taken," and plaintiff submitted an affidavit stating that Reich had "explained to [plaintiff] that the letter [placing plaintiff on the ineligible list] was part of the normal routine [and that] the entire process could take three years to complete," there is nothing in the record to indicate that Reich, who was a subordinate of the Chancellor, was himself a policymaker, or that any procedure employed by Reich could supersede Regulation A-420 adopted by the Chancellor. The

statement that plaintiff attributes to Reich, *i.e.*, that letters such as that received by plaintiff are "routine," is entirely conclusory, and there is nothing in this record suggesting that the decision by Reich was anything but a one-time occurrence.[2] The mere fact that the letter informing plaintiff that he was placed on the ineligible list was sent by the Director of the Board's Office of Appeals and Review, without more, cannot establish that his suspension without notice was pursuant to an established municipal procedure. *Cf. Hellenic, 101 F.3d at 879* (letter sent by the Director of the Mayor's Office of Contracts and the City's Chief Procurement Officer to the heads of all City agencies was not a municipal policy). Therefore, because plaintiff's sole challenge to the adequacy of Article 78 proceedings rests on his position that only a pre-deprivation hearing can provide meaningful relief given the importance of the suspension to his reputation and livelihood, an argument foreclosed by *Hellenic, 101 F.3d at 881-82*, summary judgment was properly granted.

We have considered plaintiff's other arguments and find them to be without merit. Accordingly, the judgment of the district court is hereby AFFIRMED.

----------Footnotes----------

[1] Accordingly, plaintiff's argument that the fact that there was a regulation requiring that he be given notice and an opportunity to be heard distinguishes this case from the cases where post-deprivation hearings have been found adequate is inapposite.

[2] While plaintiff now argues that he needs to conduct discovery on whether there is any such policy and on Reich's authority, he offers no explanation for his failure to seek this information before the close of discovery or to file an affidavit under Fed. R. Civ. P. 56(f) if he needed additional discovery to oppose summary

judgment. We therefore do not find this a sufficient ground for disturbing the district court's grant of summary judgment. In the absence of any such evidence, plaintiff's reliance on *Burtnieks v. City of New York, 716 F.2d 982, 988 (2d Cir. 1983)*, which held that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure," is unpersuasive.

CV-00-2078 (CPS)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Jianrong Chen,
Plaintiff,

v.

Board of Education of the
City of New York,
et ano,
Defendants

MEMORANDUM
AND ORDER

SIFTON, Senior Judge.

Plaintiff Jianrong Chen brings this action pursuant to 42 U.S.C. § 1983 against the Board of Education of the City of New York (the "Board of Education") and the City of New York. Plaintiff claims that defendants deprived him of his property or liberty without due process of law. The alleged deprivation occurred when the Board of Education placed plaintiff on the New York City Board of Education's Ineligible/Inquiry List (the "Ineligible List") during an investigation of an allegation that he used corporal punishment. Defendants now move for summary judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure, arguing that plaintiff did not possess a property interest in his position as a substitute teacher, that the Board of Education did not deprive him of any such right, and that any such deprivation was not effected without due process because an adequate post-deprivation remedy was available. For the reasons set

forth below, defendants' motion for summary judgment is granted.

BACKGROUND

The following facts are taken from the submissions of the parties and are undisputed unless noted.fn1

Plaintiff holds regular teaching licenses in New York. In March 1999, the Board of Education employed plaintiff as a substitute teacher in P.S. 126, Jacob Riis Community School. On March 15, 1999, the school at which plaintiff was teaching filed a report with the Board of Education's Office of Special Investigations ("OSI"), alleging that he engaged in corporal punishment. On March 25, 1999, plaintiff was placed on the Ineligible List by Robert J. Reich, Director of the Office of Appeals and Review of the Office of the Chancellor. On April 19, 1999, OSI held a meeting to address plaintiff's request to have his name removed from the Ineligible List. Plaintiff, a representative from plaintiff's union, and an OSI investigator attended that meeting. Thereafter, plaintiff remained on the Ineligible List from March 25 to June 15, 1999, During this period, the OSI conducted an investigation into the March 15, 1999 allegation, ultimately concluding that plaintiff had not engaged in corporal punishment.

Teachers placed on the Ineligible List cannot teach for any school district within the City School District for the City of New York. The list does not prevent teachers from teaching at private schools in New York City or at public and private schools outside New York City.

Chancellor's Regulation A-420 governs the investigation and reporting of allegations of corporal punishment. Regulation A-420 states:

> Whether the investigation is conducted by the Office of Special Investigations Corporal Punishment Unit or the supervisor, the person alleged to have engaged in corporal punishment will be afforded an opportunity to appear with representation and address the allegations upon 48 hours written notice prior to any action being recommended or taken.

(See Pl.'s Ex. 2 at 4.) No such opportunity was afforded plaintiff until the April 19, 1999 meeting. Plaintiff did not file a grievance under the collective bargaining agreement challenging his placement on the Ineligible List or file a proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules.

DISCUSSION

Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co.., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The showing needed on summary judgment reflects the burden of proof in the underlying action. The court must consider "the actual quantum and quality of proof" demanded by the underlying cause of action and which party must present such proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The "mere existence of some alleged factual dispute between the parties" will not defeat an otherwise properly supported motion for summary judgment. Anderson, 477 U.S. at 247-48.

In order to sustain an action for deprivation of property without due process of law, "a plaintiff must 'first identify a property right, second show that the state has

deprived him of that right, and third show that the deprivation was effected without due process.'" Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994) (quoting Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990)).

Defendants argue that plaintiff did not possess a property interest in his position as a substitute teacher because under New York law non-tenured teachers, such as substitute teachers or probationary teachers, do not have a property interest in their employment. Property interests in employment positions are not created by the Constitution but are defined by state law. See Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Castro v. New York City Bd. of Educ., 777 F. Supp. 1113, 1117 (S.D.N.Y. 1990) Under New York Education Law § 2599-j (7) (a) fn2 teachers that have served a full probationary period have a property interest in their employment. Castro, 777 F. Supp. at 1117. It is well settled under New York law that a probationary employee has no property rights in his employment and may be terminated for "almost any reason or no reason at all." Venes v. Community Sch. Bd., 43 N.Y.2d 520, 525 (1978); Castro, 777 F. Supp. at 1117. A substitute teacher also has no property rights under the New York Educational Law. Canty v. Board of Educ., 470 F.2d 1111, 1113 (2d Cir. 1972).

Plaintiff argues that Chancellor's Regulation A-420 grants him a property right by stating that a teacher being investigated has a right to appear with representation and address the allegations upon 48 hours' written notice prior to any action being taken. This general investigation procedure does not create a property right in employment, because plaintiff, as a substitute teacher, could be terminated for "almost any reason or no reason at all." Vanes, 43 N.Y.2d at 525. If

discharges that violated internal administrative regulations were reviewable in federal courts on the basis of contentions that the dismissals lacked due process under the United States Constitution, then "the discretion vested in the Superintendent of Schools [to discharge non-tenured teachers] would be meaningless." Canty, 470 F.2d at 1113; see also Freeman v. Gould Special Sch. Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969)

Defendants also argue that, even if the Board of Education did violate plaintiff's property rights, plaintiff had opportunity for due process of law under Article 78 of the New York Civil Practice Law and Rules. The Second Circuit has held, in accordance with relevant Supreme Court rulings, that a due process violation based on unauthorized acts by state employees may only occur when the state fails to provide a meaningful post-deprivation remedy. Hellenic Am. Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 880 (2d Cir. 1996) (citing Zinermon v. Burch, 494 U.S. 113 (1990), and Hudson v. Palmer, 468 U.S. 517, 533-34 (1984)). The rationale for requiring a hearing after and not before an alleged deprivation that results from unauthorized acts is that "in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation." Hellenic Am., 101 F.3d at 880 (quoting Hudson, 468 U.S. at 522-33). A proceeding under Article 78, which provides a hearing as well as a means of redress for petitioners, is a "perfectly adequate postdeprivation remedy" where the alleged deprivations occurred as a result of unauthorized acts by state employees. Hellenic Am., 101 F.3d at 881. In this case, the decision to place plaintiff on the Ineligible List without a prior hearing violated the standard investigation procedure laid out in Regulation A-420. As such, even if Regulation A-420 created a property right,

the act of refusing to follow this standard regulation would be unauthorized.fn3 Therefore, Article 78 provided an adequate post-deprivation procedure for review.fn4

In addition to the claim that defendants deprived plaintiff of a property right in violation of due process of law, plaintiff argues for the first time in his opposition to defendants' motion for summary judgment that defendants deprived him of a liberty interest without due process of law. Plaintiff argues that defendants deprived him of a liberty interest by disseminating stigmatizing information about him by placing him on the Ineligible List. It is well established that damage to one's reputation is not "by itself sufficient to invoke the procedural protections of the Due Process Clause." Paul v. Davis, 424 U.S. 693, 701 (1976). To constitute deprivation of a liberty interest, "the stigmatizing information must be both false ... and made public ... by the offending governmental entity." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980) (quoting Gentile v. Wallen, 562 F.2d 192, 197 (2d Cir. 1977)). Plaintiff has not alleged that defendants made any false statements about him. Rather, plaintiff complains that, when he applied for other jobs, he truthfully informed the potential employers that he was under investigation for corporal punishment, and consequently, they refused to hire him. These statements were neither false, nor made public by defendants. Plaintiff's liberty interest claim for relief is, therefore, also without factual support. Moreover, even if defendants had deprived plaintiff of liberty rights, the availability of Article 78 review precludes this Court from concluding that plaintiff was denied due process of law. See Rivera, 145 F. Supp. 2d at 308.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment dismissing the complaint is granted. The Clerk is directed to enter judgment dismissing the complaint and to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated Brooklyn, New York
December 19, 2001

United States District Judge

Footnotes

fn1 Plaintiff has failed to submit a Statement of Undisputed Facts pursuant to Local Civil Rule 56.1. Therefore, the facts contained in defendants' 56.1 statement are deemed admitted for purposes of this motion for summary judgment. See Morris V. Northrop Grumman Corp., 37 F. Supp. 2d 556, 569 (E.D.N.Y. 1999).

fn2 New York Educational Law § 2590-j(7) (a) reads as follows:
No member' of the teaching or supervisory staff of schools who has served the full and appropriate probationary period prescribed by, or in accordance with law, shall be found guilty of any charges except after a hearing as provided by section three thousand twenty-a of this chapter.

N.Y. Educ. Law $ 2590-j(7) (a) (McKinney 1991).

fn3 Plaintiff's reliance on the Second Circuit's statement in Burtnieks v. City of New York, 716 F.2d 982 (2d Cir.

1983), that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure" is misplaced. Id. at 988. The holding in Burtnieks applies to the destruction of tangible property. Oberlander v. Perales, 740 F.2d 116, 122 (2d Cir. 1984). Here, the property was neither tangible nor destroyed. In Burtnieks the Second Circuit reasoned that before the building in question was destroyed many officials authorized an order that was issued three months prior to the destruction of the building. In that circumstance, there was a period of several months prior to the destruction of the property during which all involved parties knew that the destruction of the building was authorized by officials with final decision-making power, regardless of municipal code provisions. Therefore, it did not make sense to treat the ultimate destruction as an unpredicted, unauthorized act. In this case, plaintiff's suspension was not permanent and was not known for months prior to a suspension. Here a single official, Reich, made a decision to suspend an employee in violation of an administrative code. There is no suggestion in plaintiff's complaint that there was any time during which plaintiff or any other party knew that the official planned to violate this code. Consequently, Reich's decision was unauthorized. See Rivera v. Community Sch. Dist. Nine, 145 F. Supp. 2d 302, 308 (S.D.N.Y. May 2, 2001) (finding that Article 78 provided an adequate post-deprivation remedy for a probationary teacher who was terminated for allegedly helping students to cheat on standardized tests).

fn4 Plaintiff is now barred from commencing an Article 78 proceeding by the four-month statute of limitations set forth in N.Y. C.P.L.R. § 217. However, plaintiff "cannot resuscitate [his] due process claim simply because an Article 78 proceeding is now barred by

Article 78's four-month statute of limitations," Hellenic Am., 101 F.3d at 881 Where, as here, Article 78 gave the employee a meaningful opportunity to challenge his discharge, "he was not deprived of due process simply because he failed to avail himself of that opportunity." Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir.), cert denied, 469 U.S. 832 (1984)

JUDGMENT 00-CV-2078 (CPS)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Jianrong Chen,
Plaintiff,

v.

Board of Education of the
City of New York,
et ano,
Defendants

A Memorandum and Order of Honorable Charles P. Sifton, United States District Judge, having been filed on January 2, 2002, granting the defendant's motion for summary judgment dismissing the complaint; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; that the defendant's motion for summary judgment is granted; and that the complaint is dismissed.

Dated: Brooklyn, New York
January 3, 2002

ROBERT C. HEINEMANN
Clerk of Court